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Mark E. Milsop

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Comments

Corporate Negligence: Defining the Duty Owed by Hospitals to Their Patients

The question of whether or not a hospital may be liable to a patient for the negligence of its employees, agents, and staff physicians is an area of the law which has undergone much change in recent years. Among the several theories which would justify liability, corporate negligence has been termed an "emerging trend."¹ With the Pennsylvania Supreme Court's recent decision in *Thompson v Nason Hospital*,² Pennsylvania has become one of the states which now recognize that liability may result from the breach of a duty which is owed by the hospital directly to the patient.³

In light of the *Thompson* decision, it is likely that practitioners in Pennsylvania and the Pennsylvania courts will necessarily be faced with questions as to the applicability of the doctrine of corporate negligence to particular sets of circumstances and as to the breadth of the doctrine itself. This comment will address the *Thompson* decision, the rationale for the doctrine of corporate negligence and the potential extent of liability that is likely to be recognized in Pennsylvania. It will be further suggested that an application of the tools of the emerging field of law and economics

1. *Thompson v Nason Hospital*, 527 Pa 330, 591 A2d 703, 707 (1991). Corporate negligence is often also referred to as corporate liability or hospital liability. It has been defined as meaning "the hospital is liable if it fails to uphold the proper standard of care owed to its patient." *Thompson*, 591 A2d at 707.

2. 527 Pa 330, 591 A2d 703, 707 (1991).

3. *Thompson*, 591 A2d at 703. This is not to suggest that *Thompson* created a new duty. Rather, *Thompson* recognized that a hospital may be held liable for a breach of that duty. The *Thompson* court noted that a duty owed by the hospital to its patient was recognized in Pennsylvania at least since the court's prior decision in *Riddle Memorial Hospital v Dohan*, 504 Pa 571, 475 A2d 1314 (1984) (holding that a hospital's duty of care is properly set forth in Section 323 of the Restatement (Second) of Torts (1965)). However, prior to *Thompson*, there was little reason to scrutinize the scope of the hospital's duty to its patient.

may be helpful in determining when a particular injury should be considered to have resulted from a duty owed from the hospital to the patient.⁴

I. BACKGROUND

Traditionally, the courts of Pennsylvania applied the charitable immunity doctrine to shield hospitals from liability to their patients.⁵ However, in 1965, the Pennsylvania Supreme Court reevaluated and abolished the doctrine of charitable immunity.⁶ In abolishing the doctrine of charitable immunity, the court found that the liability of a hospital was to be governed by the same principles which apply to every other employer.⁷ However, it was not until fifteen years later that the courts of this state adopted Section 429 of the Restatement (Second) of Torts, which recognized that a hospital could be held liable on the theory of ostensible agency.⁸ Ostensible agency allows a patient to recover from the hospital for the negligence of a physician, regardless of the physician's actual employment status, if the patient looks to the hospital rather than the physician for care and the hospital holds the physician out as its employee.⁹

However, in light of the changing nature of the modern hospital, other states began to go beyond the principles embodied in the theory of ostensible agency and began to recognize that a hospital has a distinct duty of care which it owes directly to the patient.¹⁰ It was within this context that the doctrine of corporate negligence was adopted by the Pennsylvania Supreme Court in *Thompson*.¹¹

4. The author suggests this analysis as a tool which can be useful in analyzing whether a particular duty has been implicated and whether that duty has been breached. Recognizing that an economic analysis will often be limited by the availability of relevant information, the author does not suggest that it is always desirable to base liability solely upon an economic analysis.

5. See, for example, *Michael v Hahnemann Medical College*, 404 Pa 424, 172 A2d 769 (1961). Charitable immunity is the rule under which "an eleemosynary institution is not liable for the torts of its agents and employees." *Michael*, 172 A2d at 770.

6. See *Flagiello v Pennsylvania Hospital*, 417 Pa 486, 208 A2d 193 (1965).

7. *Flagiello*, 208 A2d at 208.

8. *Capan v Divine Providence Hospital*, 287 Pa Super 364, 430 A2d 647 (1980). See also *Simmons v St. Clair Memorial Hospital*, 332 Pa Super 444, 481 A2d 870 (1984).

9. *Capan*, 430 A2d at 649.

10. See, for example, *Darling v Charleston Community Memorial Hospital*, 33 Ill 2d 326, 211 NE2d 253 (1965).

11. *Thompson*, 591 A2d at 703.

II. CORPORATE NEGLIGENCE

The origin of the doctrine of corporate negligence is frequently attributed to the Illinois Supreme Court's decision in *Darling v Charleston Memorial Hospital*.¹² In *Darling*, a plaintiff who broke his leg while playing in a college football game was awarded \$150,000 by a jury after his leg was amputated due to the negligence of the attending doctor.¹³ On appeal, the defendant argued to the Illinois Supreme Court that the trial court should not have allowed the jury to consider evidence of the state licensing commission's regulations, the accreditation board's regulations and the hospital's own bylaws in determining the duty which was owed to the patient by the hospital.¹⁴ In rejecting this argument, Justice Schaeffer reasoned that the "community standard," which defendant advanced, embodied a notion that the hospital does not undertake to treat its patient.¹⁵ The court then stated that the limited view of a hospital's duty no longer reflected fact.¹⁶ "Present day hospitals, as their manner of operation demonstrates do far more than furnish facilities for treatment."¹⁷

Since the *Darling* decision, a number of other states have also adopted some version of the corporate negligence doctrine.¹⁸ In following those cases which recognize an independent duty owed directly to the patient, Pennsylvania adopted a broad approach to corporate negligence in *Thompson*.

In *Thompson*, Mrs. Thompson had been transported by ambulance to Nason Hospital after she was involved in an automobile accident.¹⁹ She was subsequently admitted to Nason Hospital due to head and leg injuries.²⁰ While hospitalized, her situation deterio-

12. 33 Ill 2d 326, 211 NE2d 253 (1965).

13. *Darling*, 211 NE2d at 255.

14. *Id* at 256-57.

15. *Id* at 257.

16. *Id*.

17. *Id*.

18. *Insinga v LaBella*, 14 Fla 214, 543 S2d 209, 213 (1989). In *Insinga*, the question of whether the doctrine of corporate negligence should be recognized was heard by the Florida Supreme Court on a certified question from the United States court of appeals. At that time, the court identified Arizona, California, Colorado, Georgia, Illinois, Michigan, Missouri, Nebraska, Nevada, New Jersey, New York, North Dakota, Texas, Washington, West Virginia, and Wisconsin as having recognized some form of corporate negligence with regard to hospitals. *Insinga*, 543 S2d at 213. Since that time, Florida (in *Insinga*), Pennsylvania (in *Thompson*) and Alabama (in *Coleman v Bessemer-Carraway Medical Center*, 589 S2d 703 (Ala 1991)) have also recognized corporate liability.

19. *Thompson*, 591 A2d at 704.

20. *Id*.

rated and she eventually became partially paralyzed.²¹ She was subsequently transferred to Hershey Medical Center where a cerebral hematoma was diagnosed.²² The Thompsons' complaint alleged that her condition was the result of the negligence of Nason Hospital as well as the negligence of her treating physician at Nason Hospital. They specifically alleged that the defendants were negligent in failing to adequately examine and treat her, in failing to follow hospital rules with regard to consultations and in failing to monitor her condition.²³

The trial court granted a motion for summary judgment in favor of the hospital and the Thompsons appealed. On appeal, the superior court considered two questions.²⁴ It determined that material issues of fact existed as to (1) whether Dr. Schulz, Mrs. Thompson's treating physician, was an ostensible agent of the hospital, and (2) whether the hospital was itself negligent in the treatment of Mrs. Thompson.²⁵ In so doing, the court recognized that corporate negligence could be the basis of a cause of action against a hospital.²⁶ The trial court was therefore reversed.²⁷ The hospital sought and was granted allocatur by the Pennsylvania Supreme Court to examine the question of whether corporate negligence should be found to exist in Pennsylvania.²⁸

After tracing the history of the status of hospitals under tort law and the policies underlying corporate negligence, the court concluded that the superior court was correct in recognizing a cause of action for negligence directly against a hospital. Justice Zappala's majority opinion discussed the general scope of the duty owed by a hospital to its patients. According to Justice Zappala's opinion, there are four general areas in which the hospital has a duty toward the patient. They are:

- (1) a duty to use reasonable care in the maintenance of safe and adequate facilities and equipment . . . (2) a duty to select and retain only competent physicians . . . (3) a duty to oversee all persons who practice medicine within its walls . . . and (4) a duty to formulate, adopt and enforce ade-

21. Id at 705.

22. Id.

23. Id. Mrs. Thompson and her husband were both named as plaintiffs in the action. Id at 703.

24. See *Thompson v Nason Hospital*, 370 Pa Super 115, 535 A2d 1177 (1987).

25. *Thompson*, 535 A2d at 1177.

26. Id at 1181.

27. Id at 1182.

28. Allocatur was granted in 518 Pa 642, 542 A2d 1370 (1988).

quate rules and policies to ensure quality care for the patients.²⁹

Justice Zappala further noted that these duties are not delegable.³⁰

There are two noteworthy qualifications which the *Thompson* court set forth. First, "it is necessary to show that the hospital had actual or constructive knowledge of the defect or procedures which created the harm."³¹ Second, "the hospital's negligence must have been a substantial factor in bringing about the harm to the injured party."³² Despite this broad statement of the applicability of the general rule, the question remains as to exactly what the rule's boundaries are. Insight into the doctrine's boundaries may be gained by considering its underlying rationales and justifications.

A. Policy Rationale

The primary justification which is proffered for corporate negligence is the changing role of the hospital within society.³³ Hospitals regularly employ large staffs of doctors, nurses and others. They also contract with outside entities and individuals to provide services to patients. Most hospitals also grant staff privileges to a number of physicians who are neither independent contractors nor employees.

As early as the *Darling* decision, it has been recognized that "the person who avails himself of 'hospital facilities' expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility."³⁴ Thus, corporate negligence serves the purpose of enforcing the legitimate expectations of members of the public.

In addition to recognizing that individuals frequently look to the hospitals to provide treatment, corporate negligence assigns tort liability in accordance with actual practice. Modern hospitals normally operate as businesses accepting fees for services, thereby eliminating the rationale that patients, as the objects of charity, should not recover from charitable trusts.³⁵ Essentially, this rea-

29. *Thompson*, 591 A2d at 707.

30. *Id.*

31. *Id.* at 708.

32. *Id.*

33. Early hospitals often offered a limited number of services and normally served only the poor. Wealthier individuals were most often treated in their homes where they received better care. For a discussion of the role of early charitable hospitals, see *Flagiello*, 208 A2d at 196.

34. *Darling*, 211 NE2d at 257.

35. *Thompson*, 535 A2d at 1181.

son, which initially justified immunity in favor of hospitals, has ceased to exist.³⁶ This was implicitly recognized by the *Thompson* court. Justice Zappala explained that:

Hospitals have evolved into highly sophisticated corporations operating primarily on a fee-for-service basis. The corporate hospital of today has assumed the role of a comprehensive health center with responsibility for arranging and coordinating the total health care of its patients.³⁷

B. *Economic Justification*

In addition to the traditional policy rationales for corporate liability discussed above, there exists an economic justification. Because it is potentially difficult to define the outer limits of the appropriate application of a rule of corporate liability under the traditional policy approach, the economic justification for a rule of corporate liability merits discussion.

An economic analysis of the law seeks to determine whether a given rule of law encourages behavior which will maximize societal well being. If a particular rule is conducive to maximizing societal well being, it is said to be efficient.³⁸ Virtually all decisions made within a hospital are arrived at through the use of some type of cost benefit analysis.³⁹ However, when a decision is reached with-

36. Thus, corporate liability is a reactionary rule which subjects hospitals to tort liability in accordance with generally applicable principles of tort law which have already been readily applied to similarly situated potential tortfeasors.

37. *Thompson*, 591 A2d at 706. In a number of states, including Pennsylvania, the nature of the progression to recognition of corporate liability can be readily noted as the decisions recognizing this basis of liability usually build upon cases which have already recognized the policy basis of corporate liability. For example, in Pennsylvania, *Thompson* traces the history of hospital liability in Pennsylvania. See *id* at 706-07. In so doing it cites *Capan*, 430 A2d at 647. In recognizing liability on the basis of ostensible agency, the *Capan* court stated, "Present day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment. . . ." *Id* at 649. The *Thompson* court also specifically recognized that the Commonwealth's courts had previously adopted Section 323 of the Restatement (Second) of Torts in *Riddle Memorial Hospital v Dohan*, 504 Pa 571, 475 A2d 1314 (1984). Similarly, the Court of Appeals of North Carolina, in *Bost v Riley*, 44 NC App 638, 262 SE2d 391 (1980), in explicitly recognizing corporate liability for the first time in that state, observed that, "While the doctrine of corporate negligence has never previously been either expressly adopted or rejected by the courts of our State, it has been implicitly accepted and applied in a number of decisions. The Supreme Court has intimated that a hospital may have the duty to . . ." *Bost*, 262 SE2d at 396. Practitioners in states not yet recognizing corporate liability may thus be well-advised to utilize such an approach before their respective courts.

38. See Robert Cooter and Thomas Ulen, *Law and Economics* 11 (Scott, Foreman and Co., 1988). Conversely, where a rule of law does not lead to maximum societal well being, it is said to be inefficient.

39. For example, when a hospital is faced with a number of vacancies on its staff,

out fully considering all of the costs and benefits that a decision involves, an inefficiency may result.⁴⁰ Thus, an economic analysis can be useful here in determining whether a rule of corporate liability will create circumstances conducive to efficient decision-making by health care providers.

By utilizing an economic analysis, it can be demonstrated that a rule of corporate liability will lead to efficient levels of precaution by health care providers if liability is assigned to hospitals when (1) the hospital alone is in a position to reduce the expected cost of malpractice,⁴¹ or (2) the hospital is in a position to reduce the expected cost of malpractice by acting in conjunction with physicians.⁴²

Each time a patient is admitted to the hospital, the patient will be required to pay certain fees, some of which will eventually be allocated to the doctor and some of which will be allocated to the hospital.⁴³ These fees can be represented in the following manner:

$$\begin{aligned} f_h &= \text{the portion of the fees paid by the patient which are} \\ &\quad \text{allocated to the hospital} \\ f_d &= \text{the portion of the fees allocated to the doctor} \\ f_j &= f_h + f_d \end{aligned}$$

From these fees, various expenses will be deducted to arrive at the net benefit each party will derive from the transaction. They

should it allow hospital capacity go unutilized, admit a number of young inexperienced physicians to its staff, or increase the workload of existing staff members? When a patient is likely to remain partially paralyzed if not treated, should a risky or novel procedure be performed? When should a second doctor be consulted before making a decision?

40. Thus, using the first example from note 39, it is appropriate that, in determining whether to hire a number of inexperienced doctors, the hospital take into consideration both the benefits of treating a larger number of patients as well as the costs. One such cost of hiring an inexperienced doctor may be an increased probability that the doctor will commit malpractice. Thus, where B represents the benefit derived from hiring inexperienced doctors, P represents the probability of malpractice and L represents the cost a patient will be forced to endure if malpractice occurs, from a social standpoint it is desirable to only hire the quantity of inexperienced doctors such that $B > P \cdot L$. See *United States v Carroll Towing Co.*, 159 F2d 169 (2d Cir 1947).

41. It is assumed for the purposes of this comment that the expected cost of malpractice is reflected by the amount of damages which would be expected to be awarded upon a finding of negligence (hereinafter "E(m)").

42. A corollary to this is of course that corporate liability does not enhance efficiency when the hospital cannot reduce the expected cost of malpractice by acting either alone or in conjunction with a physician. A hospital is only incapable of engaging in efficient precaution where it can neither take a precaution itself nor negotiate with the physician to take additional precautions. Such a situation would occur where the hospital cannot foresee a harm which would occur from the doctor's failure to take a precaution.

43. For the purposes of this comment, it does not matter whether various fees are billed separately.

can be represented as:

$$\begin{aligned} N_h &= \text{the hospital's net benefit from the transaction} \\ N_d &= \text{the doctor's net benefit from the transaction} \\ N_j &= N_h + N_d^{44} \end{aligned}$$

As rational decision-makers, both the doctor and the hospital will seek to yield the maximum possible net benefit from the transaction.⁴⁵ In order to do so, they will also take into account the expected cost of malpractice which they will be required to bear and the cost of preventing malpractice. These items can be represented as follows:

$$\begin{aligned} E(m)_h &= \text{the expected value of the hospital's liability to the patient for malpractice.} \\ E(m)_d &= \text{the expected value of the doctor's liability to the patient for malpractice.} \\ E(m)_j &= E(m)_h + E(m)_d \\ p_h &= \text{the cost of precaution against malpractice to the hospital.} \\ p_d &= \text{the cost of precaution against malpractice to the doctor.} \\ p_j &= p_h + p_d^{46} \end{aligned}$$

Thus, $N_d = f_d - (p_d + E(m)_d)$.⁴⁷ Similarly, $N_h = f_h - (p_h + E(m)_h)$ and $N_j = f_j - (p_j + E(m)_j)$. Under a rule of immunity in favor of the hospital, $E(m)_h$ will be equal to 0 and $E(m)_j$ will be equal to $E(m)_d$.

From this it can be seen that where $p_j < E(m)_j$ and $p_d > E(m)_d$, an immunity rule will fail to create an incentive to avoid injury to the patient even though it would be efficient to take additional precaution against the injury.⁴⁸ This inefficient outcome may occur

44. Such fees would include the costs of supplies, etc. For the purposes of this comment, however, it will be assumed that the only costs incurred by the hospital are the costs of precaution against malpractice and the expected value of malpractice liability.

45. This concept is correctly termed profit maximization.

46. Further note that the respective values of $E(m)_h$, $E(m)_d$, and $E(m)_j$ will not exceed the ability of the doctor, the hospital or both to pay a judgment. Also, where both the doctor and the hospital may be held liable as joint tortfeasors, $E(m)_h$ will equal $E(m)_j - E(m)_d$ and $E(m)_d$ will equal $E(m)_j - E(m)_h$ (since they are jointly liable).

Under Pennsylvania law, each physician must carry liability insurance in the amount of \$100,000 per occurrence to an aggregate of \$300,000, and each hospital must carry \$100,000 of liability insurance to a maximum of \$1,000,000. In addition, a contingency fund was created by statute to cover the next \$1,000,000 in liability. Health Care Services Malpractice Act, 40 Pa Cons Stat Ann § 1301.701 (1990 Supp).

47. Note the relationship between p & $E(m)$. As p increases, $E(m)$ should decrease. Similarly, as p decreases, $E(m)$ should increase. See Cooter and Ulen, *Law and Economics* at 348 (cited in note 38).

48. There are actually two scenarios which could occur under these circumstances. (1) If $f_d > E(m)_d$, the procedure involved will be carried out with a resulting incidence of in-

either because of a differential between the actual cost of injury discounted by the probability of nonoccurrence ($E(m)$) and $E(m)_d$ or because of a differential between p_d and p_j .

Where $E(m) > E(m)_d$ the physician, as a profit maximizer, will have an incentive to invest in precautionary activity only to the extent that precautionary activity will reduce $E(m)_d$. Under such circumstances, where it is possible to reduce $E(m)$ by an amount less than $E(m) - E(m)_d$, an inefficient outcome may result since the doctor will have no (legal or economic) incentive to increase precautionary activity.⁴⁹ A rule of corporate negligence can thus increase efficiency to the extent that p_j is less than $E(m)_j$ by encouraging precautionary activity which would not otherwise be taken.⁵⁰

Where as a result of the differential between p_d and p_j an inefficiency could occur under an immunity rule, the inefficiency can be avoided under a rule of corporate negligence.⁵¹ If either an otherwise efficient precaution could best be implemented only by the hospital, or where precaution could only be best implemented through joint action, a rule of corporate negligence will create a potential efficiency gain.⁵² Hence, corporate negligence should be found except when the doctor is the least cost avoider and the hospital cannot efficiently create incentives for the doctor to take additional precautions.⁵³

jury. This may occur where either the resulting injury discounted by the probability of non-occurrence is in fact less than the physician's fee or the physician perceives that he would be found non-negligent (thereby rendering $E(m)_d = 0$). (2) If $f_d < E(m)_d$, the procedure may not be performed.

49. In economic terms, since there is no incentive for a physician to reduce $E(m)$ unless $E(m)_d$ is also reduced, the physician will externalize the cost of injury, at least in part. See Cooter and Ulen, *Law and Economics* at 45 (cited in note 38). A rule of corporate liability is designed to force the hospital, a joint tortfeasor, to accept responsibility for that portion of those losses which it could have efficiently prevented. In light of the foregoing, the dissent's position in *Thompson* (that corporate liability is an unnecessary deep pockets approach) becomes unconvincing. See *Thompson*, 591 A2d at 709 (Flaherty dissenting).

50. Note, however, that inefficiency may still result where $E(m) > E(m)_j$.

51. Put another way, a rule of immunity is inefficient when either the hospital is the least cost avoider or the parties acting jointly are the least cost avoider.

52. This final corollary reflects the fact that the hospital and doctor can transfer a portion of f_j amongst themselves such that the least cost avoider assumes the burden of engaging in precautionary activity. Although such bargaining is theoretically possible under an immunity rule, the incentive to do so is unilateral. Because the incentive is unilateral, such bargaining would be expected only if $E(m)_d$ is greater than p_h . This leaves a number of instances in which there is an insufficient motivation for a physician to initiate bargaining.

53. For a general discussion of the role of law and economics in the area of agency law, see Note, *An Efficiency Analysis of Vicarious Liability under the Law of Agency*, 91 Yale L J 168 (1981). For an economic discussion of the actual impact of varying liability rules in medical malpractice cases, see Patricia Danzon, *The Frequency and Severity of*

III. APPLICATION

As previously observed, the doctrine of corporate negligence, as adopted by the Pennsylvania Supreme Court is potentially very broad. A discussion of the underlying duty may be most useful by analyzing authority from Pennsylvania as well as other jurisdictions.

A. *Duty to Exercise Reasonable Care in the Procurement and Maintenance of Equipment*

A basic duty which a hospital has is to exercise reasonable care in the procurement and maintenance of equipment.⁵⁴ Application of this aspect of corporate negligence may be illustrated by reference to the facts of *Hamil v Bashline*.⁵⁵ In *Hamil*, Mrs. Hamil transported her husband, who was suffering from chest pains, to a hospital which was staffed by members of the Bashline Hospital Association.⁵⁶ Because the physician assigned to the emergency room could not be located, Mr. Bashline was treated by a Dr. J. F. Johnston. Dr. Johnston ordered an EKG to be taken.⁵⁷ When the machine failed to operate due to a faulty electrical outlet, he directed that another machine be used.⁵⁸ He left the hospital thereafter.⁵⁹ Because a second EKG machine could not be found, Mrs. Bashline took her husband to the private office of a Dr. Saloom where he died while an EKG was being performed.⁶⁰

Under these facts, there are at least two possible bases for application of the corporate negligence doctrine to the maintenance of equipment. First, assuming that the hospital had constructive notice that the electrical outlet was faulty, it could be argued that the hospital failed to exercise reasonable care in allowing an electrical

Medical Malpractice Claims, 27 J L & Econ 115 (Apr 1984).

54. This, however, does not mean that a hospital would necessarily be held strictly liable for defective equipment. The Pennsylvania Superior Court has in fact previously interpreted Section 402A as inapplicable to a hospital. *Podrat v Codman-Shurtleff Inc.*, 384 Pa Super 404, 558 A2d 895, allocatur denied, 524 Pa 609, 569 A2d 1368 (1989). See also *Grubb v Albert Einstein Medical Center*, 255 Pa Super 381, 387 A2d 480 (1978).

55. 481 Pa 256, 392 A2d 1280 (1978). Because the hospital was not named as a defendant, the issue of the hospital's liability was not at issue. *Hamil*, 392 A2d at 1280. The facts are nonetheless appropriate to illustrate how corporate liability could become an issue when equipment is not properly maintained.

56. *Id.* at 1283.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

outlet in an area used to treat patients under exigent circumstances to remain in a defective condition. Second, there exists a question as to whether it was reasonable to have only one EKG machine available. Assuming that this could not be found reasonable, the hospital could be held negligent for failing to adequately procure and maintain equipment.

A second illustration of when liability may result from defective equipment is the case of *Emory University v Porter*.⁶¹ In *Emory*, a baby received burns as a result of an unshielded light bulb on an incubator.⁶² The parents filed an action against the hospital in which the burn occurred. However, because the parents had not alleged that the incubator was defective or that the hospital should have known of the danger posed by the incubator, the parents did not prevail.⁶³ Had the parents alleged that the hospital knew or should have known of the defective and/or dangerous condition of the incubator, it is likely that the hospital would have been found liable on the basis of corporate negligence.⁶⁴

B. *Duty to Exercise Care in Granting, Renewing and Extending Staff Privileges*

One of the most basic decisions which a hospital must make is whether to grant, renew or extend staff privileges to a particular physician. The doctrine of corporate negligence itself is a recognition that patients have an expectation that the hospital will only admit physicians who are qualified to its staff.⁶⁵

61. 103 Ga App 752, 120 SE2d 668 (1961).

62. *Emory University*, 120 SE2d at 669.

63. *Id.*

64. See J. Douglas Peters, *Eleven Theories of Direct Liability*, 24 Trial 82, 85 (Nov 1988). Peters argues that liability may not be premised solely upon the equipment's age (which is what the plaintiff did in *Emory University*). He argues that a hospital will be held liable only if the equipment is defective and the hospital fails to act to correct the danger posed by the equipment. Peters, 24 Trial at 85 (cited within this note).

65. Arguably, even when there exists a relationship between the patient and the physician, the existence of a particular doctor's staff privileges at a particular hospital (or hospitals) will have frequently been an important factor in the patient's initial decision to treat with a particular physician.

It does not necessarily follow that a hospital would always be liable when a physician commits a tort off of the hospital's premises. Where a physician commits an act of malpractice off of the premises, there are several barriers which may preclude recovery. First, there exists a problem of proving that a doctor's affiliation with a given hospital did in fact influence the patient's choice of doctors. In a case in which the tort occurs on hospital premises, a patient can more readily demonstrate the relevance of a doctor's staff privileges to the decision to utilize a specific physician for the treatment involved in the act of malpractice. The question is one of proximate causation. Second, the injury which occurs on hospital

While the facts of the *Thompson* case itself did not involve the question of whether the hospital was negligent in granting, renewing or extending staff privileges, this issue has previously arisen on a number of occasions in other jurisdictions.

In *Insinga v LaBella*,⁶⁶ the plaintiff was treated at Florida's Humana Hospital for several months by a Dr. LaBella.⁶⁷ According to the opening statement of counsel for the plaintiff, the plaintiff's decedent would have had a ninety percent chance of survival had Dr. LaBella properly diagnosed and treated the patient.⁶⁸ The plaintiff also indicated that Dr. LaBella was not a doctor at all but was a criminal who had fraudulently obtained a medical license using the name of a dead Italian physician and that the defendant hospital was negligent in not properly verifying Dr. LaBella's application for staff privileges.⁶⁹ A verdict was directed by the United States District Court for the Southern District of Florida in favor of the defendant hospital.⁷⁰ The question was subsequently certified to the Florida Supreme Court by the United States Court of Appeals for the Eleventh Circuit.⁷¹ The Florida Supreme Court concluded that a hospital may be held liable for a breach of its duty owed directly to the patient based upon the hospital's negligent decision to grant staff privileges.⁷²

Of particular note is the fact that the Florida Supreme Court identified the policy behind this specific duty. It stated that, as a matter of public policy, "hospitals are in the best position to pro-

premises is distinguishable from one which occurs off hospital premises because, in the former case, the tort involves the actual exercise of staff privileges. Third is the question of whether the hospital's duty to exercise reasonable care in granting staff privileges extends to non-patients. A case in which it was held that a hospital was not liable for the conduct of a physician which occurred outside hospital premises is *Pedroza v Bryant*, 101 Wash 2d 226, 677 P2d 166 (1984). There, the Washington Supreme Court held that the doctrine of corporate negligence was cognizable in Washington but that a patient who was injured by an act of malpractice which occurred off of hospital premises had not stated a cause of action. The court reasoned that corporate negligence is a duty which a hospital owes only to its patients. *Pedroza*, 677 P2d at 172.

66. 14 Fla 214, 543 S2d 209 (Fla 1989).

67. *Insinga*, 543 S2d at 210. Plaintiffs were unable to actually serve LaBella with process. Dr. LaBella had been extradited to Canada prior to when the complaint was to have been served. The extradition occurred because he was under indictment in Canada for the manufacture and sale of illegal drugs. *Id.*

68. *Id.* at 210.

69. *Id.*

70. *Id.* The verdict was directed before the close of the plaintiff's evidence. *Id.*

71. *Id.*

72. *Id.* at 211-12. Section 768.60 of the Florida Statutes imposes a statutory duty upon hospitals. However, because the injury occurred prior to the statute's effective date, the case was decided as a matter of common law. Torts, 21 Fla Stat § 768.60 (1986).

tect their patients and, consequently have an independent duty to select and retain only competent independent physicians seeking staff privileges.⁷³

In *Johnson v Misericordia Community Hospital*,⁷⁴ the plaintiff suffered paralysis of his right thigh muscle after a nerve and artery were damaged during surgery to remove a pin fragment from the plaintiff's hip.⁷⁵ The record reflected that the operation in question was performed by a Dr. Salinsky at Milwaukee's Misericordia Hospital.⁷⁶ Salinsky had been licensed to practice medicine and had been recommended by members of Misericordia's medical staff.⁷⁷ However, the record also clearly demonstrated that his application had not been investigated and that several representations contained on his application were false. Specifically, Salinsky had represented that he had not been previously denied staff privileges nor had his privileges been reduced.⁷⁸ Contrary to Salinsky's representations, he initially had privileges to perform simple orthopedic procedures at one hospital, but his status at that hospital was later changed to curtesy staff after a request for additional orthopedic privileges was denied.⁷⁹ Another hospital suspended his privilege to perform any hip procedures after it received a report of Salinsky's "continued flagrant bad practices."⁸⁰ The record also reflected that Salinsky was neither board-certified nor board-eligible in orthopedic surgery and that, at the time of the approval of his appointment, seven malpractice suits were pending against him.⁸¹

On the basis of the record before it, the Wisconsin Supreme Court upheld the judgment which had been entered against the hospital.⁸² In upholding the judgment, the court relied upon the theory of corporate negligence. In the court's opinion, Justice Coffey discussed the duty which a hospital must meet in selecting

73. *Insinga*, 543 S2d at 214. This is, of course, a least cost avoider approach.

74. 99 Wis 2d 708, 301 NW2d 156 (1981).

75. *Johnson*, 301 NW2d at 158.

76. *Id.*

77. *Id.* at 159.

78. *Id.*

79. *Id.* at 161.

80. *Id.* at 161-62.

81. *Id.* at 162.

82. *Id.* at 175. Prior to trial, the plaintiff had settled with Salinsky. *Id.* at 158. A jury trial was held in which Misericordia Hospital was the defendant. After the trial, a judgment was entered against the hospital in the amount of \$333,429.39 based upon the jury's finding that the hospital was 80% negligent and that Salinsky was 20% negligent. *Id.* at 163. The Wisconsin Court of Appeals affirmed the judgment. Appeal was taken to the Wisconsin Supreme Court. *Id.*

members of its staff. After recognizing that one of the hospital's primary functions is to screen members of its staff, the court stated that, "We do not adopt the legal theory that knowledge of incompetency is the standard for determining whether a hospital exercised due care in selecting its staff."⁸³ Rather, the court held that the plaintiff was only required to show that the hospital failed to exercise reasonable care to determine whether Salinsky was qualified to receive orthopedic privileges.⁸⁴ The court found that the hospital was chargeable, at a minimum, with having knowledge of information which could have been readily obtained had it verified the information contained in Salinsky's application.⁸⁵

A hospital may also be held liable for the failure to withdraw staff privileges when it has received notice of the misconduct of a staff physician. In *Copithorne v Framingham Union Hospital*,⁸⁶ a material issue of fact was held to exist where a plaintiff alleged that she was drugged and raped by her physician. The Massachusetts court held that if the facts alleged by the plaintiff were proven true, they could form the basis of a jury's verdict against the hospital since the plaintiff had claimed that the defendant hospital had actual notice of allegations that the physician had sexually assaulted patients.⁸⁷

C. Duty to Monitor and Review Patient's Treatment and Progress

Closely related to the duty to exercise care in granting and renewing staff privileges is a duty to monitor and review a patient's progress and treatment. The *Thompson* decision makes it clear that a modern hospital acts as a patient's health care coordinator and that a patient is entitled to expect that the hospital is ultimately going to cure the patient. In accordance with this sentiment, Justice Zappala stated that when a physician fails to act properly, the hospital and its employees have a responsibility to take appropriate action. "If the attending physician fails to act after being informed of such abnormalities, it is then incumbent upon the hospital staff member or employee to so advise the hospi-

83. Id at 171.

84. Id. Reasonable care was defined as "that degree of care ordinarily exercised by the average hospital." Id.

85. Id at 172.

86. 401 Mass 860, 520 NE2d 139 (1988).

87. *Copithorne*, 520 NE2d at 143.

tal authorities so that appropriate action may be taken.”⁸⁸ Beyond the general articulation of the duty to monitor and review a patient’s treatment and progress, this requirement has been further analyzed in other jurisdictions.

In *Fridena v Evans*,⁸⁹ because of a serious injury that the plaintiff, Sharon Evans, sustained to her leg, Dr. Fridena performed an operation on the plaintiff.⁹⁰ During the operation Dr. Fridena inserted a pin into Evans’ leg and hip.⁹¹ After the operation, one of the plaintiff’s legs was one and one-half inches shorter than the other.⁹² Six months later, a second operation was performed to correct the plaintiff’s condition.⁹³ As a result of the second operation, the plaintiff’s leg became a total of three inches shorter than the other.⁹⁴ Thereafter, Evans filed an action naming as defendants Dr. Fridena, another doctor who assisted in the operation and Physicians and Surgeons Hospital.⁹⁵ After a verdict was entered in favor of the plaintiff, the hospital appealed, arguing that Dr. Fridena was an independent contractor and that the hospital could not be held vicariously liable.⁹⁶ The appellant’s argument was rejected by the Arizona Supreme Court, which held that the hospital could be held liable on a theory of corporate negligence.⁹⁷

Specifically at issue in *Fridena* was the plaintiff’s contention that, in allowing Dr. Fridena to perform a second operation, the hospital breached its duty to allow use of its facilities only by “professionally competent physicians who treat their patients with accepted medical procedures.”⁹⁸ In holding that the trial court’s denial of a directed verdict in favor of the hospital was not error, the Arizona Supreme Court stated that the hospital had notice of the

88. *Thompson*, 591 A2d at 709.

89. 127 Ariz 516, 622 P2d 463 (1981).

90. *Fridena*, 622 P2d at 464.

91. *Id.*

92. *Id.* The plaintiff’s complaint did not allege that the first operation was negligently performed. *Id.*

93. *Id.* The second operation was also performed by Dr. Fridena. The procedure involved bisecting the femur and inserting a bone graft. *Id.* at 464-65.

94. *Id.* at 465.

95. *Id.*

96. *Id.*

97. *Id.* at 466.

98. *Id.* at 465. The plaintiff’s expert witness testified at trial that “the decision and recommendation to do the type of surgical procedure involved fell below the standard of care.” *Id.* at 467. The defendant’s appeal also raised the issue of whether there existed a second school of thought, which was applicable to Dr. Fridena so as to render plaintiff’s expert’s testimony inadmissible (in that the expert’s testimony was not with regard to the applicable school). This argument was rejected. *Id.*

procedure employed by Dr. Fridena and was therefore potentially liable.⁹⁹ *Fridena* is significant in that the decision was not based on either the hospital's grant of staff privileges to the doctor or the hospital's failure to withdraw his privileges. Rather, the issue was solely whether the hospital was negligent as a result of permitting Dr. Fridena to perform a specific procedure upon a specific patient.¹⁰⁰ In recognizing corporate negligence, Justice Holohan stated that the trend is "to hold the hospital responsible where the hospital has failed to monitor and review medical services being provided within its walls."¹⁰¹ Thus, the hospital's duty includes an obligation to take reasonable steps to monitor and review the treatment being received by a patient.

*Poor Sisters of St. Francis v Catron*¹⁰² takes an even broader approach to liability based upon a hospital's failure to adequately act upon abnormalities in the care received by a patient. In *Catron*, the plaintiff experienced trouble breathing and was unable to speak above a whisper as a result of the negligence of the hospital and the patient's doctor in permitting an endotracheal tube to remain in the patient's throat for five days.¹⁰³ Evidence presented at trial established that the patient's nurses and inhalation therapist were aware of the deviation from normal practice but did not draw it to the attention of either the treating physician or their superiors.¹⁰⁴ The hospital presented to the trial court a motion for judgment on the evidence, arguing that the decision to treat a patient is a medical question for which it could not be held liable.¹⁰⁵ The trial court denied the motion and was affirmed on appeal.¹⁰⁶

In affirming the trial court, Judge Shields noted that a hospital cannot generally be held liable for the actions of its agents in following a physician's orders, but "an exception to this rule exists when the nurse or other hospital employee knows the doctor's or-

99. Id at 466. In this case, Dr. Fridena, while not acting as a servant of the hospital in performing the operation, had knowledge of the procedure in several other capacities (which he held with regard to the hospital). Thus, his knowledge would be imputed to the hospital itself. Id.

100. Id.

101. Id.

102. 435 NE2d 305 (Ind App 1982).

103. *Catron*, 435 NE2d at 306. Evidence which was presented at trial indicated that an endotracheal tube should be removed within three to four days after it has been inserted. Id at 308.

104. Id.

105. Id at 307.

106. Id at 308.

ders are not in accordance with normal medical practice."¹⁰⁷ Thus, in the case before it, the evidence was sufficient to demonstrate that the hospital was negligent because the patient failed to receive care in accord with standard medical practice and that the hospital's employees failed to report or question the deficiency in the patient's care.¹⁰⁸

D. Duty to Formulate and Enforce Rules, Policies and Procedures

The final area in which the *Thompson* court suggested the existence of a duty is in the formulation of rules, policies and procedures. Because the hospital serves as the patient's health care coordinator, receives payment for the use of its services and facilities and is in a position to promulgate policies which can minimize the risk of harm resulting from procedural deficiencies, this area of hospital liability is proper. Two areas in which a hospital can effectively act include the promulgation and enforcement of policies requiring the procurement of informed consent and/or consultations where appropriate.

In *Karibjian v Thomas Jefferson Hospital*,¹⁰⁹ Mrs. Karibjian, acting as the executrix of her husband's estate, filed suit against Thomas Jefferson Hospital after her husband died as the result of the injection of a contrast medium during a cerebral arteriograph performed in that hospital.¹¹⁰ The wife's complaint alleged, in part, that the hospital had not obtained her husband's informed consent before it injected the contrast medium.¹¹¹ The hospital made a motion to dismiss those portions of the complaint which alleged that the hospital was negligent in failing to procure the patient's informed consent.¹¹² The district court, in an opinion by Judge Lord, overruled the motion to dismiss. Applying Pennsylvania law, Judge Lord noted that, "Any touching of a patient by a physician is technically a battery unless it is done with the patient's knowing consent."¹¹³ Judge Lord then looked to Pennsylvania law and determined that a hospital owes a duty to its patient to exercise

107. *Id.*

108. *Id.*

109. 717 F Supp 1081 (E D Pa 1989).

110. *Karibjian*, 717 F Supp at 1082-83.

111. *Id.* at 1083.

112. *Id.*

113. *Id.* at 1084.

reasonable care in supervising those who work under its roof.¹¹⁴ He then concluded that the plaintiff had stated a cause of action for which relief could be granted as to the averments based upon the doctrine of informed consent.¹¹⁵

Judge Lord's approach to the question of corporate negligence appears to be correct. Under Pennsylvania law, a battery occurs when a patient is touched by a physician unless informed consent has been given.¹¹⁶ However, it is not a battery which the institution has committed.¹¹⁷ Rather, by allowing its facilities to be used in order to commit a battery, the hospital has been negligent.¹¹⁸ As the *Thompson* court has clearly established, the hospital holds a special relationship vis-a-vis its patients. Thus, when hospital policy does not require informed consent to be obtained prior to performance of a procedure, it has clearly violated a duty owed to its patients.¹¹⁹

114. *Id. Karibijian* was decided after the superior court decision in *Thompson* but before the supreme court decision.

115. *Id.* The court also decided the issue of whether the doctrine of informed consent is applicable to the administration of a drug or contrast medium. Judge Lord concluded that when the issue is the method of administration rather than the substance injected, the patient must give informed consent before the substance is injected. In so holding, Judge Lord distinguished *Boyer v Smith*, 345 Pa Super 66, 497 A2d 646 (1985). In *Boyer*, the superior court held that, since Pennsylvania bases its doctrine of informed consent upon a battery theory, a physician has no duty to obtain informed consent before proscribing an oral medication. It also stated, in dicta, that the doctrine of informed consent only applied to cases involving surgical or operative procedures. In rejecting the *Boyer* dicta, Judge Lord applied a battery analysis and concluded that the *Boyer* court went beyond the facts before it and ignored the middle ground situation where a touching occurs, but is something less than a surgery. See also *Gray v Grunnagle*, 423 Pa 144, 223 A2d 663 (1966); *Cooper v Roberts*, 220 Pa Super 260, 286 A2d 647 (1971) ("The same duty of disclosure obtains whether or not the treatment can be technically termed as operative").

116. *Karibjanian*, 717 F Supp at 1084.

117. Judge Lord, however, did not specifically state whether or not he considered the hospital to be guilty of negligence or an intentional tort. In a footnote, he stated that for the purpose of a rule 12(b)(6) (of the Federal Rules of Civil Procedure) motion, it was unimportant which theory would justify liability. *Id.* at 1084 n 3.

118. Specifically, the hospital has violated both the third and fourth duties enunciated by the *Thompson* court. See note 29 and accompanying text. This is also consistent with the recognition of the hospital's role as the patient's health care coordinator. See note 37 and accompanying text.

119. See note 29 and accompanying text. As the hospital's duty encompasses a responsibility to "oversee all persons . . ." and to "enforce adequate rules and policies," the hospital cannot escape liability merely by having a policy. See *Thompson*, 591 A2d at 707. The hospital is clearly obligated to make reasonable efforts to enforce its policies. Enforcement of an informed consent procedure is not necessarily difficult. At a minimum, each doctor should be required to place on file documentation that informed consent has been secured. However, it would seem that the most practical method for a hospital to protect itself would be to require the presence of a member of the hospital's staff when consent is secured. An

The duty of the hospital to exercise reasonable care in coordinating the patient's care¹²⁰ readily encompasses a responsibility to take measures to assure that a patient's primary physician will procure all necessary consultations. According to the plaintiffs' complaint in *Thompson*, Mrs. Thompson's paralysis was attributable at least in part to the hospital's negligence in ignoring its own rules and regulations with regard to consultations.¹²¹ Because the issue of consultation was raised in *Thompson*, it may be concluded that the court would be likely to hold that consultations are within the scope of a hospital's duties.¹²²

The consultation question is one which has been specifically considered in the corporate negligence context on a variety of occasions by courts in the United States. In *Sewell v United States*,¹²³ an action was instituted pursuant to the Federal Tort Claims Act¹²⁴ after the plaintiff allegedly received inadequate care at a Veterans Administration hospital¹²⁵ (hereinafter the Veterans Administration will be referred to as "the VA"). Carl Sewell had sought treatment at and was admitted to the VA Medical Center in Shreveport, Louisiana with a staph infection.¹²⁶ He was later discharged. Mr. Sewell subsequently returned to the VA hospital

additional issue which would arise is whether a hospital could be held liable when the patient is given inadequate information. The issue would hinge upon whether the hospital made a bona fide or reasonable attempt to secure the patient's consent.

120. See note 37 and accompanying text.

121. *Thompson*, 591 A2d at 705. Apparently, Mrs. Thompson's death may have been hastened by the failure of the attending physicians to consult Mrs. Thompson's cardiologist relative to the use of anti-coagulants. The complaint alleged that Mr. Thompson had advised Nason Hospital's emergency room personnel of his wife's heart condition. *Id.*

122. However, the *Thompson* decision cannot be read as specifically recognizing that liability can be based upon the hospital's failure to adhere to its policies with regard to consultations. The *Thompson* court's discussion of the facts reveals that:

The complaint alleged *inter alia* that Mrs. Thompson's injuries were the direct and proximate result of the negligence of Nason Hospital . . . in failing to adequately examine and treat her, in failing to follow its rules relative to consultations, and in failing to monitor her condition during treatment.

Id. However, after concluding that a hospital owes a duty of care directly to its patients, the court merely concluded that there existed a sufficient issue of material fact without passing on which specific averments of the complaint presented an issue of material fact. See *id.* at 709. Nonetheless, given the facts of *Thompson* and the broad categories of duty enunciated, it is certainly reasonable to infer that, if the court is later called upon to determine whether the general duty announced encompasses a duty to procure consultations, the court's answer will be in the affirmative.

123. 629 F Supp 448 (W D La 1986).

124. Federal Tort Claims Act, 28 USC § 2671 et seq (1988).

125. *Sewell*, 629 F Supp at 448.

126. *Id.* at 451-54. More specifically, the patient's infection was "bacteremia," also known as "septicemia." A blood culture tested positive for staphylococcus aureus. *Id.* at 452.

where he was attended to by a resident who did not conduct a physical examination but increased the dosage of one medication and administered a shot.¹²⁷ Mr. Sewell was not readmitted.¹²⁸ Mr. Sewell's wife's testimony indicated that at the time of his return to the VA hospital, the plaintiff had a "red lump the size of a goose egg."¹²⁹ Mr. Sewell's condition eventually resulted in the development of an abscess and paraplegia.¹³⁰

In concluding that the hospital was liable to Sewell, the district court applied Louisiana law.¹³¹ The court found that the failure to consult a specialist in infectious disease was below the appropriate standard of care. The court further found that if a specialist had been consulted, a different or additional treatment would have been administered which would have been more beneficial.¹³²

The possible application of liability based upon a failure to obtain a consultation can be further illustrated by *Ingram v Little Co. of Mary Hospital*.¹³³ In *Ingram*, a patient commenced an action against her physician and the hospital to which she had been admitted after a course of treatment subsequent to a miscarriage failed and injury resulted.¹³⁴ The complaint included an averment that the hospital willfully and wantonly failed to call in another physician after her physician's course of treatment failed but before the complained-of harm occurred.¹³⁵ On appeal, the Illinois appellate court found that the trial court erred in dismissing the above noted averment. Justice McNamara, citing *Darling*, stated that a hospital may be liable for both its agent's misconduct as well as a violation of its duty to review and supervise medical

127. Id at 454.

128. Id.

129. Id.

130. Id at 451.

131. Id at 455.

132. Id at 458. Pennsylvania law, while similar, would require an inquiry as to whether the defendant's negligence was a substantial factor in increasing the risk of harm to the patient as set forth in *Hamil*, 392 A2d at 1280. In *Hamil*, a jury verdict was entered in favor of the defendant hospital after the jury was charged that it could not find that the defendant's conduct was the proximate cause of the plaintiff's death unless the plaintiff would have died without treatment. Id at 1289. Based upon the jury instruction, the Pennsylvania Supreme Court reversed and ordered a new trial. It held that once expert testimony is introduced which establishes that the defendant's acts or omissions have increased the risk of harm to the patient, it is for the fact finder to determine whether such acts or omissions were a substantial factor in bringing about an injury. Id.

133. 108 Ill App 3d 456, 438 NE2d 1194 (1982).

134. *Ingram*, 438 NE2d at 1195-96.

135. Id at 1196. Under Illinois law, willful and wanton conduct need not be intentional. It may be found where there is a reckless disregard for the safety of others. Id.

care.¹³⁶

It should also be recognized that liability may be found regardless of whether the situation involves a physician who does not obtain a consultation from a specialist or a non-physician member of the institution's staff who fails to obtain a physician's services for a patient. In *Polischeck v United States*,¹³⁷ the plaintiff's wife arrived at a Naval Regional Medical Center (hereinafter "the NRMC") suffering from a variety of symptoms suggestive of subarachnoid hemorrhage.¹³⁸ The decedent was examined by a physician's assistant who failed to properly diagnose the etiology of her problem.¹³⁹ The decedent was then released from the hospital.¹⁴⁰ The decedent was not examined by a physician prior to her release nor was her chart reviewed by a physician.¹⁴¹ Three days later the decedent became unconscious and was returned to the NRMC.¹⁴² The NRMC eventually transferred her to the University of Pennsylvania where she died after undergoing an operation.¹⁴³ Expert testimony revealed that had the decedent initially been properly diagnosed, she would have had a 75% chance of recovery.¹⁴⁴ At trial, the plaintiff also introduced testimony that the symptoms should have at least suggested to a physician the possibility of the decedent's true illness.¹⁴⁵ The plaintiff, however, did not introduce evidence that the physician's assistant failed to conform to the standard of care applicable to physician's assistants when he failed to render a correct diagnosis.¹⁴⁶

Based upon the evidence adduced at a non-jury trial, the district court found that the NRMC was negligent. In arriving at his decision, Judge Bechtle noted, "The Pennsylvania courts, however, apparently have yet to articulate in a published decision the standard

136. *Id.*

137. 535 F Supp 1261 (E D Pa 1982).

138. *Polischeck*, 535 F Supp at 1269.

139. *Id.* at 1263-64.

140. *Id.* at 1264.

141. *Id.* The plaintiff later returned a second time to the hospital along with the decedent. At that time the decedent was initially examined by the same physician's assistant who then referred her to an unlicensed physician on the hospital's staff. That physician also failed to properly diagnose the patient's condition. *Id.* However, the district court's decision rested solely upon the negligence surrounding the plaintiff's first examination. *Id.* at 1269 n 2.

142. *Id.* at 1265. This was the third time that the decedent was seen at the NRMC.

143. *Id.*

144. *Id.* at 1269.

145. *Id.*

146. *Id.* Whether or not to consult a physician under the NRMC'S policies was entirely within the physician's assistant's discretion. *Id.*

of care governing hospitals in the development of policies for the care and treatment of their patients."¹⁴⁷ Judge Bechtle then noted that those jurisdictions which had considered the question had held the hospital to either a standard of reasonableness or a community standard.¹⁴⁸ It was then concluded that the NRMC could be found liable under either theory.¹⁴⁹

IV. CONCLUSION

In light of the above cases concerning a hospital's duty to its patient, it is apparent that when a patient fails to receive adequate care, the failure of which the hospital could have prevented through the exercise of reasonable care, a hospital may be liable to the patient for resulting injury.

Recognition of the doctrine of corporate negligence, as it applies to hospitals, reflects a realization of the role of the modern hospital in society. The doctrine requires that a hospital fulfill its role as a patient's health care coordinator by the exercise of reasonable care. As the hospital receives fees for services and is often in a position to protect its patients from suffering unnecessary harm, the doctrine is entirely appropriate.¹⁵⁰

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147. Id at 1270.

148. Id, citing *Kastler v Iowa Methodist Hospital*, 193 NW2d 98 (Iowa 1971).

149. *Polischeck*, 535 F Supp at 1270. It is worth noting that one way in which an issue similar to that in *Polischeck* may arise is in regard to a health maintenance organization (HMO). HMOs frequently make significant use of medical paraprofessionals. While the courts of Pennsylvania are yet to determine whether the doctrine of corporate negligence applies to an HMO, the superior court in *Boyd v Albert Einstein Medical Center*, 377 Pa Super 609, 547 A2d 1229 (1988), held that an HMO may be liable for the tortious conduct of its ostensible agents. In so holding, Judge Olszewski relied upon the court's earlier decisions in *Capan*, 430 A2d 647 (1980), and *Simmons*, 481 A2d 870 (1984) (see note 8), which recognized the ostensible agency theory as it relates to a hospital. There is little reason to expect that the result would be any different with regard to corporate liability. Indeed, an HMO conducts business upon the premise that managed health plans can provide a more cost effective method of providing health insurance than traditional insurers. Given this price-conscious approach to health care, a court would be hard pressed to justify a decision not to force such an organization to fully internalize its costs.

150. By applying this analysis, hospitals will be potentially liable for a variety of injuries for which it would not have previously been held liable. This result, however, means nothing more than that hospitals must take reasonable precautions in delivering care to its patients. If the hospital fails, corporate liability assures that the patient will be justly compensated for his or her loss. Such is what the public has the right to expect from a modern hospital.